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No. 252

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In the Supreme Court of the United States

OCTOBER TERM, 1969

JULIO DEJORIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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Assistant Attorney General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1969 (Pet. App. 3-4). The petition for a writ of certiorari was filed on June 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury's verdict was supported by the evidence.

2. Whether petitioner, having failed to object to the charge to the jury, may now argue that it improperly stated the effect of the presumption of correctness attaching to determinations by the Commissioner of Internal Revenue.

STATEMENT

From January 1, 1960, through September 30, 1962, petitioner Julio DeJoris owned the Cabaret Club, a night club located in Miami Beach, Florida, which served alcoholic beverages to its customers and offered entertainment by comedians, specialty dancers, and strip teasers (R. 118, 120-122).[1] There is no dispute that the Cabaret Club was subject to the cabaret tax levied by Section 4231(6) of the Internal Revenue Code of 1954 (R. 300).[2]

The Commissioner found that the Cabaret Club's books and records did not accurately reflect its total sales or the portion of sales subject to the cabaret tax (R. 309-310).[3] Accordingly, the Commissioner determined the Club's total sales by taking the Club's total

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[1] "R." refers to the joint appendix in the court of appeals.

[2] Section 4231 was repealed by Section 301 of the Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136, effective December 31, 1965.

[3] The cabaret tax was imposed only on sales during entertainment hours in rooms in which the entertainment was offered.

purchases and multiplying that figure by an average mark-up. It was also determined that 90 percent of the adjusted sales were subject to the cabaret tax (R. 308).

Petitioner made partial payments of the tax deficiency assessed against him and instituted a refund suit in district court. The United States filed a counterclaim for $26,161.25, the unpaid balance of the assessment (R. 424). Following the trial, the jury, in response to special interrogatories, found that the Commissioner correctly determined the club's total sales but that only 75 percent of those sales were subject to the cabaret tax (R. 314-315). The district court accordingly dismissed petitioner's complaint and awarded the United States $18,851.40 on its counterclaim (R. 441-442). On May 16, 1968, the district court denied petitioner's motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial (R. 442-445). The court of appeals affirmed (Pet. App. 1-4).

ARGUMENT

1. The jury found that petitioner had understated total sales of alcoholic beverages and accepted the methods used by the Commissioner to recompute total sales. In attempting to discredit the Commissioner's method, petitioner contends that no allowance was made for gifts of liquor or waste. The record establishes, however, that the Internal Revenue Service made ample allowance for waste and give-aways, first by the investigating agent (R. 179-181, 199-206) and again at the administrative appellate level (R. 205).

Thus, there is no merit to petitioner's contention that the district court erred in refusing to enter judgment notwithstanding the verdict, or, in the alternative, to order a new trial.

2. Petitioner did not object to the district court's charge to the jury (R. 311), and thus the allegations of error which he made for the first time on appeal were properly rejected as untimely (Pet. App. 2). Rule 51, Federal Rules of Civil Procedure.

At all events, the district court correctly informed the jury that the Commissioner's determination of the deficiency in tax was presumptively correct and that the burden was on the taxpayer to show that it was erroneous. This same burden is upon the taxpayer even though the question is raised by the government's counterclaim. See *Lesser* v. *United States*, 368 F.2d 306, 310 (C.A. 2). Moreover, it has long been established that recovery cannot be obtained in tax refund litigation unless the claimant comes forward with evidence sufficient to prove that he overpaid his tax in a specific amount and that he consequently is entitled to a refund in that amount. *Lewis* v. *Reynolds*, 284 U.S. 281, 283; *Helvering* v. *Taylor*, 293 U.S. 507, 514. Thus, there was no error in the charge of the court on this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY, 1969.